NO. 11,820

In the United States Circuit Court of Appeals for the Ninth Circuit

TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CONCRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-SEABROOK, a Copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*,

and

UNITED STATES OF AMERICA, *Appellant*,

v.

TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CONCRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-SEABROOK, a Copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES, *Appellees*.

Upon appeals from the District Court of the United States for the Southern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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CITATIONS

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Upon Appeals from the District Court of the United States for the Southern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

OPINIONS BELOW.

The district court's memorandum entitled "Ruling on Pre-Trial" (R. 307-309) has not been reported. The district court wrote no opinion in connection with its final judgment entered June 6, 1947. Its oral opinion (R. 1428-1448) pursuant to which it ordered the judgment modified and corrected (R. 1459) has not been reported.

JURISDICTION.

These are appeals in an eminent domain proceeding brought by the United States (R. 2). From the final judgment entered June 6, 1947 (R. 311-330), appealing condemnees filed their notice of appeal on August 26, 1947 (R. 367). From an order entered December 2, 1947, correcting and modifying the judgment (R. 1459), the United States filed its notice of appeal on March 1, 1948 (R. 1460-1461). The jurisdiction of the district court over the proceeding rests on the Act of August 1, 1888, 40 U. S. C. sec. 257, and the Second War Powers Act, 56 Stat. 176, 50 U. S. C. App. secs. 631-645b (R. 6). Jurisdiction of the district court to correct and modify the judgment was sought to be invoked under Rules 60, 75 (h) and 81 (7), Federal Rules of Civil Procedure, and Section 473, California Code of Civil Procedure (R. 382). Jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225(a).

QUESTIONS PRESENTED.

Appeal of Tavares Construction Company, Inc., et al.

1. Whether the issue of just compensation for appellants' option to purchase the property from the United States was presented, tried and determined in this proceeding.

2. Whether there was reversible error in the trial court's instructions, to which no objection was made, on how appellants' compensation should be determined.

3. Whether it was reversible error to let the United States impeach appellants' evidence by showing an unqualified admission of fact made by appellants in an offer of compromise.

4. Whether there was reversible error in the Government's argument to the jury, to which no objection was made.

5. Whether there was reversible error in the trial court's failure to instruct the jury on the legal effect of appellants' lease and option agreement, when no such instruction was requested.

6. Whether the verdict and judgment are supported by evidence.

7. Whether there was prejudicial error in awarding appellants nothing rather than nominal damages.

Appeal of the United States.

1. Whether the trial court erred or exceeded its jurisdiction when, after appeal had been taken from the final judgment, it ordered that the judgment be modified to exclude appellants' option to purchase the property condemned.

STATEMENT.

Concurrently with the acquisition of an interest in the property here being condemned, the United States gave to appellants a lease of the property, coupled with a purchase option. After filing its original petition herein to condemn the fee simple title, the United States filed an amended and supplemental complaint to take in addition the interests granted to appellants by the lease. The fundamental issue on these appeals is whether the compensation payable for the taking of such interest was correctly determined. Stated more fully, the material facts are as follows:

On November 27, 1941, Concrete Ship Constructors entered into a contract with the United States Maritime Commission (R. 97-128) to construct concrete barges at National City, California, in a yard to be furnished by the contractor and financed by the Defense Plant Corporation (R. 99). On December 27, 1941, the Tavares Construction Company[1] entered into an agreement with Defense Plant Corporation regarding the yard to be used. That agreement, known as "Plancor-407" (R. 49-67, admitted as Ex. W, R. 696-697) provided that the Tavares Company, having or being about to secure a lease of a six-acre tract

[1] All the rights of the Tavares Construction Company were held in trust for the benefit of Concrete Ship Constructors, a joint venture comprising the Tavares Company and its other co-appellants. For the purposes of this appeal it is unnecessary to distinguish between those parties, and they are generally referred to collectively as the Tavares Construction Company in the Record and in appellants' brief (cf. R. 660, 681; Appellants' Br. 10).

of harbor land in National City, would assign that lease to Defense Corporation and would construct shipyard facilities on the property at the expense of Defense Corporation, the cost to Defense Corporation not to exceed $404,500 nor include executive salaries or overhead except direct expenses approved by Defense Corporation. The agreement provided that Defense Corporation subleased the site and leased the facilities to the Tavares Company for a term ending December 31, 1947, to be automatically extended to December 31, 1949, to be used for construction of boats for the Government but not for other purposes without permission; that the Tavares Company would pay for insurance, taxes and utilities and would pay as rent $83,327 for each boat delivered to the United States until Defense Corporation was reimbursed for the cost of the yard, after which no rent was to be paid. Paragraph 12 provided that either party could terminate the lease by giving notice that the Tavares Company no longer needed substantial use of the yard for construction of boats for the United States. Paragraph 14 gave to Defense Corporation the right to cancel the lease if (a) substantially all of the Tavares Company's shipbuilding contracts with the United States were terminated or canceled,[2] or (b) the United States was refused priority with respect to use of the facilities, or (c) the Tavares Company became insolvent, or (d) the Tavares Company violated terms of the lease. If the lease expired or was terminated under paragraph 12 or 14 (a), the Tavares Company was given for 90 days the privilege of negotiating for the purchase or lease of part or all of the facilities and machinery and the option to buy the entire site, facilities and machinery for the then-unreimbursed cost or cost less depreciation, whichever was greater, and for another 90 days the privilege (if it could lawfully be given) of meeting any offer for the purchase of part or all of the facilities and machinery. The agreement further provided that Defense Corporation could transfer the lease to another branch of the Government, but the Tavares Company could not sublease or assign its rights without permission.

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[2] Those contracts could all be canceled by the Maritime Commission at any time (R. 124, 163-164, 215).

On January 1, 1942, the Tavares Company secured a lease (R. 129-134) from the City of National City covering an 18-acre tract (designated parcel 1 in the present proceeding; R. 6), and assigned the lease to Defense Corporation (R. 134-135) pursuant to their agreement.[3]

Plancor-407 was amended on April 13, July 1, July 29, and August 12, 1942 (R. 68, 72, 77, 81), to increase the permissible cost of the facilities and the rent to be paid. The Tavares Company was given contracts for additional boats on June 30, 1942 (R. 186-220), and October 26, 1943 (R. 136-172), and a larger yard became necessary. The original petition in the present case was filed November 10, 1942, at the request of the Chairman of the Maritime Commission, to condemn in fee simple the original yard (parcel 1) and ten additional parcels, numbered 2 to 11 (R. 2-17). On the same day an order was entered for possession of parcels 4 and 5 after 30 days and for immediate possession of the other parcels (R. 21-23). On the following day Plancor-407 was again amended to increase the permissible cost of the properties and the rent, and to add the condemnation award, when determined, to the permissible cost, to the total rent, and to the option price (R. 86-91). Rent and permissible cost were again increased on March 9, 1943 (R. 92-96).

On October 3, 1944, a declaration of taking as to parcels A[4] and 2 to 11, inclusive, was filed (R. 28-34) and judgment entered thereon (R. 35-41). On December 23, 1944, an amended declaration of taking was filed which included parcel 1 (R. 42-48). Judgment on the amended declaration of taking was entered December 27, 1944 (R. 242-248).

On January 15, 1945, the United States filed an amended and supplemental complaint, to take all interests in the property except those of the United States and Defense Plant Corporation (R. 249-258). On motion of appellants

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[3] A lease of six of these 18 acres had previously been given by National City to the Allied Engineering and Shipbuilding Company which in turn had assigned it to the Tavares Company (R. 278, 875-876, 900).

[4] On September 23, 1944, the petition had been amended to include a twelfth piece of land, designated Parcel A (R. 24-26) and an order for immediate possession of it was entered (R. 27).

(R. 259-264) the United States was ordered (R. 265) to file a bill of particulars, which it did on April 16, 1945 (R. 266-267), stating that it sought to take all the interest of appellants in the property.

On October 4, 1946, the parties filed a joint pre-trial memorandum submitting to the court the questions of whether the lease and option rights of appellants under Plancor-407 were taken in this action, and whether appellants had a compensable interest in the property (R. 301-306). On October 10, 1946, Judge Yankwich filed his pre-trial ruling answering both questions in the affirmative (R. 307-309), and on February 5, 1947, his order to the same effect (R. 310). The latter order also approved a stipulation of the parties (R. 278-300) as to certain facts.

The case was tried before Judge McCormick sitting with a jury, February 17 through 27, 1947 (R. 392-1305). At the trial it was stipulated that the Tavares Company's lease coupled with an option was taken by the United States on December 23, 1944 (R. 401).

The fee title to the tidelands here involved was held by the City of National City under legislative grant from the State of California which carried the provision that they should never be conveyed away, and if conveyed would revert to the State (R. 406-407). The State conceded that one dollar would be just compensation for its interest in the tidelands, but objected to the taking on the ground that it was for the purpose of giving a purchase option to the Tavares Company, which the State argued was not a public purpose. It was thereupon pointed out on behalf of the Tavares Company that the objection was obviated by the fact that by the amended and supplemental complaint the purchase option given to the Tavares Company was also being condemned by the United States (R. 410-414). The court indicated that it would request the State to present its views if it became necessary to consider the question (R. 414-415). No such request was ever made.

Pursuant to ruling of the court (R. 438, 444) the burden of going forward was taken by the defendants, first the fee owners Carl and Pearl Johnson as to Parcel 9 (R. 452-490) and National City as to Parcels 1, 2, 3, 5, 6, 7, 8 and A (R. 491-596), then the lessees San Francisco Bridge Company as to Parcel 7 and part of Parcel A (R. 597-660) and appellants as to all parcels (R. 660-922). The court

allowed all parties to stipulate that adverse rulings should be deemed excepted to (R. 462-463).

National City, in presenting its evidence, faced the difficulty of proving the "market value" of its tidelands which the state law provided could not be sold (R. 491-492). That difficulty was met by introducing testimony as to what would have been the market value of the land if it could have been sold (R. 534, 536, 553, 557, 561-562, 579).

At the commencement of appellants' case, their counsel indicated that they regarded their purchase option as part of the interest taken by the United States and to be evaluated in this proceeding (R. 663-664). Appellants informed the court that they intended to offer evidence of the value of the services rendered by them as consideration for their rights under the agreement, conceding that it had nothing to do with the normal measure of compensation or market value of their rights but contending that where the United States condemns rights under a contract with itself, it must pay at least as much as the consideration given for the rights, or the amount that could have been recovered in the Court of Claims in an action for breach of the contract (R. 698-701). The court stated that appellants would not be allowed to show what they could have recovered in a suit for breach in the Court of Claims, but that the case would be submitted to the jury on the theory that the jury should fix just compensation (R. 701-702). In connection with offers in evidence of portions of the pre-trial stipulation and agreed statement of facts, the court stated that, in valuing the option, occurrences and agreements between the parties subsequent to December 23, 1944, should be excluded from consideration as irrelevant. So far as they might afford basis for recovery for breach or frustration, the court indicated that they could only be litigated in the Court of Claims (R. 725-727).

For appellants, five witnesses testified as to the value of appellants' rights under the agreement, valuing them at $750,000 (Tavares, R. 748), $600,000 (Hotchkiss, R. 802), $500,000 (Anewalt, R. 831), $573,000 (Bleifuss, R. 869) and $500,000 (Mueller, R. 881), respectively. Each of these witnesses stated that he included the option in valuing appellants' contract rights (R. 747-748, 750, 757; 802, 810, 813. 818-819; 833, 835, 843; 870; 887, 893-894). Neither Mr. Tavares nor Mr. Anewalt made any allocation of value

between the lease and the option (R. 776, 843). Mr. Mueller testified that the option was worth $500,000 and the lease itself was worthless (R. 881, 901). Mr. Anewalt justified his appraisal by stating that appellants' profits had amounted to $1,000,000 a year (R. 851). The United States maintained a continuous objection to appellants' testimony, on the ground, among others, that a purchase option was not such an interest in the property as to be compensable in eminent domain. That objection was consistently overruled on the ground that the court would not deviate from the pre-trial ruling that the option was taken and compensable in this proceeding (R. 745-747, 781, 802, 830-831, 869, 881; cf. R. 1395-1398).

Mr. Tavares testified that a minimum fee for appellants' supervisory services in constructing the shipyard facilities would have been 10% of cost plus 2% for designing and engineering services (R. 741). On cross-examination the United States introduced, solely as impeachment of that testimony (R. 788), a statement by appellants that a minimum supervisory fee would have been 3%, or $80,000 (R. 770-771). Appellants' objection that the statement was inadmissible because contained in an offer of compromise was overruled (R. 769).

With the approval of the court, it was stipulated that the price that appellants would have had to pay under their option, as of December 23, 1944, was $2,141,236.49 as shown by appellants' Exhibit Q (R. 652-658, 1305-1333).

For the United States, Mr. Shattuck and Mr. Mason testified that the lease and option had no market value because the lease tenure was subject to many doubts and uncertainties, and because the purchase price called for by the option was greatly in excess of the value of the property (R. 1111-1117, 1132-1140, 1150-1153, 1160, 1175, 1180, 1199-1200, 1202, 1205).

Witnesses both for appellants (R. 749, 798-801, 832-835, 870, 884-889) and for the United States (R. 1097-1104, 1114-1117, 1169-1171) in testifying as to the value of appellants' rights under the lease and option agreement explained what they understood those rights to be. That practice was initiated by appellants, and no objection was made to it at any time. Although appellants' interest under the lease could not be transferred without consent of the United States (R. 64), all the valuation witnesses

assumed a transfer, for the purpose of determining "market value" (R. 774, 816, 851, 869, 907, 1095-1096, 1200).

The court's instructions to the jury included the following:

> (As to the National City interest:) The real question for your determination is the market value of the property at the time of the taking (R. 1284).
>
> You should give no consideration whatever to the willingness or unwillingness of any or all of these defendants to have the Government take this land or any interest therein, if any such there be. * * * Market value does not depend in any degree upon the owner's will (R. 1285).
>
> You will likewise disregard any agreements between the state and the city limiting the uses (R. 1286).
>
> (As to appellants' interest:) The interest of the Tavares Construction Company and its associates arises out of an instrument which is in evidence as defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instrument, to wit, what is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale (R. 1293).

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc. to purchase the entire shipyard site, facilities and machinery * * * (R. 1294).

Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero (R. 1295-1296).

At the close of the charge, the court asked for exceptions (R. 1296). Appellants took none. After the jury had retired, it asked to have the instructions as to appellants' interest repeated, which was then done (R. 1300-1303).

The jury returned its verdict awarding $6,750 for the Johnson property and $650,000 for the National City property, of which latter $50,000 was allocated to the San Francisco Bridge Company lease. The jury awarded to appellants, "for the condemnation and taking of all their interests under the agreement of December 27, 1941, (known as Plancor 407, as amended) $0" (R. 1304-1305). The court entered judgment on the verdict June 6, 1947 (R. 311-330), awarding appellants nothing for the "taking by plaintiff of all right, title, and interest" of appellants "in and to the real property * * * and the option, leasehold and possessory rights * * *" (R. 327).

On June 6, 1947, appellants filed their motion for new trial (R. 331-358), which was heard on the same day (R.

1334-1417). All but the first of the contentions raised by appellants in this Court were there presented. At the hearing the court pointed out, among other things, that appellants had made no response to the court's inquiry whether there were objections to the instructions (R. 1374-1378), and that the court had felt bound to follow and had followed Judge Yankwich's pre-trial ruling that the option was compensable but that did not necessarily mean that it was to be compensated for if the jury found that it had no value (R. 1395-1398). New trial was denied on July 29, 1947 (R. 366), and on August 26, 1947, notice of appeal was filed (R. 367).

Thereafter, on November 18, 1947, appellants filed their notice of motion to correct and modify the judgment (R. 381-382). The motion was heard on December 2, 1947 (R. 389, 1418-1448, 1459). The United States opposed the motion on the grounds that the judgment was correct as entered (R. 1420-1421), and that the court was without jurisdiction to modify the judgment after an appeal had been taken (R. 1423-1424). However, the court ordered the judgment amended in conformity with its opinion given orally at the hearing, so as to strike the word "option" from the description of the interests taken from appellants and compensated for in this proceeding (R. 1436-1445). That was done on the ground that it had been included by inadvertence and did not reflect the judgment of the court (R. 1437, 1445). The United States excepted to that order (R. 1446) and filed its notice of appeal therefrom on March 1, 1948 (R. 1460-1461). Pursuant to stipulation of the parties (R. 1463-1465), this Court ordered consolidation of the appeals (R. 1465).

SPECIFICATION OF ERRORS, ON APPEAL BY THE UNITED STATES FROM ORDER MODIFYING JUDGMENT.

1. The district court erred in making its order of December 2, 1947.

2. The district court lacked jurisdiction to amend the judgment entered June 6, 1947.

3. The district court erred in concluding that the questions as to compensation for the option had not been considered or decided at the trial of the case.

4. The district court erred in granting the motion of November 17, 1947, to correct and modify the record and judgment.

5. The district court erred in holding that the verdict did not include compensation for the option.

SUMMARY OF ARGUMENT.

Appeal from the Judgment.

The court ruled on pre-trial that appellants' purchase option under the agreement of December 27, 1941, was part of their interest in the property taken and compensable herein. That view was adhered to by the court during the trial, in instructing the jury, and on the motion for new trial. All parties so understood and all valuation testimony included the option as well as the lease. Since the option was so included in the valuation, it is unnecessary to consider appellants' contention that its exclusion would have been error.

The trial court correctly instructed the jury that appellants' compensation should be the market value, if any, of their interest, disregarding the restrictions to which it was subject. Since the jury returned a substantial verdict in favor of National City for its inalienable interest in the property, and the jury was instructed to proceed in the same way in valuing all interests, the verdict of zero in favor of appellants cannot be attributed to any misunderstanding by the jury to the effect that appellants' interest could not have a "market value" because it was transferable only on consent of the lessor. Rather, it must be attributed to acceptance of the Government's evidence that appellants' interest had no value even if alienable. In any event, appellants preserved no objection to the instructions.

The trial court did not err in allowing the United States to rebut appellants' evidence as to the value of the consideration given by them for their lease agreement by introducing an inconsistent admission made by appellants in an offer of compromise. An admission against interest, as distinguished from a mere compromise offer, may be put in evidence against the party making it even if contained in an offer of compromise.

The Government's argument to the jury was supported by the record and was not prejudicial. In the absence of motion for mistrial, objection, or request for admonition to the jury, it could afford no ground for appeal. Appellants' present contention regarding it was argued to the trial court on motion for new trial, which was denied. That exercise of discretion by the trial court should not be reviewed on appeal.

Witnesses for both sides as to the value of appellants' rights under the lease testified as to their understanding of the effect of the lease. That was necessary to an intelligent weighing of their testimony. If error, it was invited by appellants, who opened up that line of inquiry. The market value of the lease depended on its appeal to prospective buyers, not on its correct legal construction. Its true legal effect was not in issue, and no instruction regarding it was requested.

The verdict and judgment are supported by evidence and are not contrary to law. The error, if any, in awarding nothing rather than nominal compensation, is not prejudicial.

Appeal from the Order Modifying the Judgment.

The judgment as originally entered correctly reflected the issues tried, including compensation for appellants' purchase option. The order that the option be stricken from the judgment was erroneous. It was not a correction of a clerical error and, being made after appeal had been taken from the judgment, it was beyond the court's jurisdiction.

ARGUMENT.

Appellants' third point on appeal is based on the overruling of their objection to evidence offered by the United States. With that exception, the points urged by them were not preserved in the trial court by offer of proof, objection, request for instruction, or otherwise, and therefore properly present nothing for review by this Court. *Atlantic Brewing Co.* v. *William J. Brennan Grocery Co.*, 79 F. 2d 45, 47 (C. C. A. 8, 1935).

For purposes of clarity, this brief will discuss appellants' points both as to substance and procedure in the order in which they are presented in their brief.

I.

The Issue of Just Compensation for Appellants' Purchase Option Was Tried and Determined in This Proceeding.

Appellants' first point on appeal is that the trial court was in error in holding that it was without power to award compensation for appellants' option to purchase the property condemned (Br. 10-22). But the trial court never held that it was without power to award compensation for appellants' option. Its only holding excluding the option from the case was made on appellants' own motion (R. 381), after entry of the judgment here appealed from and in fact after this appeal was taken. At that time, over the protest of the United States, the trial court ordered the judgment modified to omit the option from the interests covered by the judgment (R. 1418-1448, 1459). The United States has appealed from that order (R. 1460). Throughout the trial and up to the time that order was entered, the trial court consistently held, over the repeated objection of the United States, that the option was included in the interests taken and compensable herein. All witnesses testified on that basis, and the jury was instructed to include the value of the option in its award. The judgment, as originally entered and appealed from, expressly included the option.

An examination of the record shows that appellants' contrary assertion is unfounded. On October 4, 1946, before the trial, appellants and the United States filed a joint memorandum on pre-trial, submitting to the court the questions:

> (a) Have the lease and option rights of Tavares Construction Company, granted under the "Agreement of Lease" dated December 27, 1941, and by the supplements thereto, been taken and condemned by this action?
>
> (b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding? (R. 301-306.)

By ruling filed October 10, 1946 (R. 307-309), and order filed February 5, 1947 (R. 310), the court answered both questions in the affirmative. In its ruling the court said, "The existence of the option is a matter to be considered

by experts in determining the value of the property taken'' (R. 309).

At the trial appellants adduced five witnesses as to the value of their rights under the lease and option agreement (R. 718-777, 748; 796-827, 802; 828-866, 831; 867-879, 869; 880-922, 881). All of them testified that they included the option in valuing appellants' interest in the property (R. 747-748, 750, 757; 802, 810, 813, 818-819; 833, 835, 843; 870; 887, 893-894). Two of them, Mr. Tavares and Mr. Anewalt, testified that they made no allocation of value between the lease and option (R. 776, 843). Another, Mr. Mueller, testified that all the value was in the option, that the lease itself had none (R. 901). To the testimony of each of appellants' valuation witnesses the United States objected on the ground, among others, that an option was not such an interest in property as to be compensable in eminent domain. That objection was invariably overruled, the court stating that it would not review the pre-trial ruling on the point (R. 745-747, 781, 802, 830-831, 869, 881; cf. R. 1395-1398). Without waiving its objection (R. 1090), the United States also introduced evidence as to the value of the option along with the lease. Its evidence was that the value of both was zero (R. 1099-1101, 1113, 1116, 1139; 1170, 1175, 1203). The court explicitly instructed the jury to consider the option in valuing appellants' rights under the contract (R. 1294) and to ''consider the entire instrument, not just parts of it'' (R. 1295). Those instructions were afterward repeated at the jury's request (R. 1302-1303). The verdict, as to appellants, was for the ''taking of all their interests under the agreement'' (R. 1305) [5] and the judgment entered thereon was for the ''taking by plaintiff of all right, title and interest'' of appellants ''in and to the real property * * * and the option, leasehold and possessory rights * * *'' (R. 327). In the face of such a record there is clearly no justification for appellants' contention that the trial court ''indicated throughout the trial of these proceedings below that it was of the conviction that a United States District Court was not the proper forum to award the Tavares Construction Company compensation'' for the taking of its option (Br. 11).

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[5] Appellants made no objection to the form of the verdict when it was proposed or when it was submitted to the jury (R. 1228-1231, 1296).

Appellants' present contention that the court excluded the option from the issues at the trial rests on a misconstruction of two rulings of the court. The first occurred when appellants proposed to introduce evidence of the value of the services rendered by them under the lease agreement, on the theory that that represented the minimum compensation to which they were entitled when their rights under the agreement were condemned, because it was what they could have recovered in the Court of Claims if the United States, instead of condemning the agreement, had breached it and appellants had sued in the Court of Claims for the breach (R. 698-699). The court stated that the issue was just compensation for the taking, and that appellants would not be allowed to show what their recovery might have been in a Court of Claims suit (R. 701-702). That statement was plainly correct.[6] Moreover, it presents nothing for review since it was not a ruling excluding any evidence actually offered by appellant at that time (R. 700). Indeed, the United States said it would not object to evidence as to the fair value of the supervisory fee (R. 700) and such evidence was later introduced by appellants (R. 741).

The second ruling now claimed by appellants to have excluded the option from the issues was in fact no more than a ruling that appellants could not litigate in this condemnation case any claims that they might have against the United States, arising subsequent to the date of taking (R. 725, 727). That ruling was made in accordance with appellants' own contention, stated by their counsel as follows:

> Our theory is that there is a deadline, that there was a deadline, of December 23, 1944, the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that (R. 725).

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[6] Whatever appellants' rights might have been if there had been a breach of the agreement by the United States, it is clear that just compensation in eminent domain is not to be measured by the consideration that the condemnee gave in acquiring the condemned property. He may have made a good bargain, in which case the United States cannot deprive him of its benefits; he may have made a poor bargain, in which case the United States cannot be required to bear the burden of his poor judgment. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 285 (1943); *Olson* v. *United States,* 292 U. S. 246, 255 (1934); *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123 (1924).

Since the ruling exactly conformed to appellants' own contention there advanced, they are in no position now to complain of it. Moreover, the ruling was plainly correct. No rule is better settled than that the rights of the parties in a condemnation proceeding are fixed as of the date of taking. *United States* v. *Miller,* 317 U. S. 369, 374 (1943). The court's ruling related only to suppositious occurrences after the date of taking; it in no way suggests that any particular rights were or were not taken. In fact, the court said, "When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project. * * * Anything that comes within the period up to December 23, 1944, is a relevant matter to this case" (R. 725). The court was clearly laying down rules to be followed in valuing the option, and was not, as appellants now contend, holding that the option could not be valued at all in this proceeding.

The fact that appellants, immediately after the foregoing rulings, introduced their evidence as to the value of the option, and that the court admitted it over the Government's objection that the option was not a compensable interest, shows that the rulings were not intended by the court or understood by appellants as excluding the option from the case. On their face they are not susceptible of such interpretation. The court submitted the case to the jury with explicit and repeated instructions to include the value of the option in their award. It was not until after the jury returned its verdict awarding appellants nothing for their interests that appellants suggested that the option had not been included in the trial. The suggestion is at variance with the plain facts, and is no more than a belated attempt to salvage for future re-litigation a claim that was litigated in the present proceedings at appellants' insistence and was determined in a manner not to their liking.

Since the option was included in the valuation, it is unnecessary to consider appellants' contention that its exclusion would have been error.[7]

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[7] Upon this question see *East Bay Mun. Utility Dist.* v. *Kieffer,* 99 Cal. App. 240, 246, 278 Pac. 476, 279 Pac. 178 (1929), citing *Matter of City of New York (Upper N. Y. Bay),* 246 N. Y. 1, 30-34, 157 N. E. 911 (1927), certiorari denied, 276 U. S. 626 (1928). Although

II.

The Trial Court Did Not Err in Instructing the Jury How to Determine Appellants' Compensation.

Appellants argue (Br. 23-48) that the trial court erred in its instructions to the jury as to how appellants' compensation, if any, should be determined. After giving the charge, the court asked if there were any exceptions (R. 1296) and appellants made no objection, either then or when the charge as to their compensation was later repeated, in the presence of appellants' counsel (R. 1300), at the jury's request (R. 1300-1303). Appellants now contend that they can challenge the instructions in this Court without having done so below, because that right is given by section 647 of the California Code of Civil Procedure, and the procedure in federal condemnation proceedings is required to conform to local law. General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 258. Appellants are mistaken as to the scope and effect of the conformity provisions. It has uniformly been held that such provisions do not include the manner of preserving objections for the purposes of appeal, and that regardless of local practice a federal appellate court will not review action of a trial court if no objection was preserved at the trial. *United States* v. *United States Fidelity Co.,* 236 U. S. 512, 529 (1915) (General Conformity Act, 28 U. S. C. sec. 724); *Grand River Dam Authority* v. *Thompson,* 118 F. 2d 242 (C. C. A. 10, 1941) (conformity provision for eminent domain proceedings under the Federal Power Act, 16 U. S. C. sec. 814). The conformity provisions of the General Condemnation Act here involved are not distinguishable from those construed in the cited cases. Cf. *Comparet* v. *United States,* 164 F. 2d 452 (C. C. A. 10, 1947). This Court has held, in cases arising in California under the General Conformity Act, that failure to object to instructions at the trial precluded a review of them on appeal. *Fidelity & Casualty Co. of New York* v. *Griner,* 44 F. 2d 706, 708 (1930); *Radius* v. *Travelers Ins. Co.,* 87 F. 2d 412, 415 (1937). Not having preserved objections to the

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the meaning of "property" as used in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279 (1943).

instructions, appellants are not entitled to attack them on appeal.

Appellants' contention is equally unsound on its merits. It is their theory that the trial court in effect charged the jury that if appellants' interest in the property was not transferable then no compensation should be allowed for it. They argue at length that such is not the law. That may be conceded. However, the United States does not concede that such an instruction was given, or was understood by the jury to have been given, or if it had been given, could have had any effect on the verdict under the evidence.

The instruction to which appellants object was as follows:

> Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero (R. 1295-1296).

The agreement which created appellants' interest in the property provided that it could not be transferred without the consent of Defense Plant Corporation and the Maritime Commission (R. 64). Appellants argue that in view of this provision the single sentence "If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero" in effect directed a zero verdict (Br. 34). It cannot be so understood. The form of the verdict submitted to the jury (R. 1296), which pro-

vided a place for an award to appellants, demonstrates the error of appellants' contention that the quoted sentence "was nothing more than a direction by the court to award nothing to the Tavares Construction Company * * *" (Br. 34). The quoted paragraph, as a whole, plainly deals only with the question of how much an assumed buyer would have paid. The court said, "The question being what could it have been sold for * * * above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale" (i. e., a sale for a sum above the payments called for by the agreement) "your verdict will be for the amount you in your judgment determine the company could have gotten for it." In such a context, the direction to award nothing if it could not have been sold plainly meant, if no buyer would have paid anything for it.

That this was the true meaning is made perfectly plain by the instruction to "proceed in the same manner as you proceed as to the market value of the land" (R. 1295). Most of the land was owned by National City under a legislative grant which made it strictly inalienable. Cal. Stats. 1923, c. 46 (R. 491-492, 1209). Nevertheless all witnesses as to its value assumed its marketability (R. 534, 536, 553, 561, 579, 962, 1027, 1087), and the court instructed the jury in fixing its market value to disregard any agreements between the state and the city limiting its uses (R. 1286). The instruction to proceed in the same manner as to appellants' interest necessarily incorporated this charge along with the rest of the court's definition of market value.

The National City property was strictly inalienable, yet all witnesses agreed that it had market value (R. 536, 554, 580, 944, 1024, 1089) and the court gave no instruction to the jury concerning the possibility that it could not be sold. Appellants' property, on the other hand, was not inalienable but was only subject to the requirement that sales be consented to by the Government, and there was evidence in the record that such consent could probably have been secured (R. 774). There was no testimony that appellants' interest lacked market value because it was inalienable; there was testimony that it had no market value because the lease was subject to many contingencies and uncertainties and the option called for a price far in excess of the value of the

property (R. 1111-1117, 1199-1200). On such a record, the instruction, confined to appellants' interest only, to award nothing if it could not be sold, obviously referred only to the possibility that it would not be attractive to buyers. That it was so understood by the jury is clearly shown by the fact that a substantial verdict was returned in favor of National City (R. 321, 1304), although the instruction was that the jury should proceed "in the same manner" in valuing both interests. Even if the jury had understood the instruction to mean that the award should be zero if appellants' interest was inalienable, that could not have affected the verdict because, as already pointed out, appellants' interest was not inalienable.

Appellants' statement (Br. 35) that the United States sought throughout the proceedings to prove that the rights of appellants were inalienable is not true. Of course an interest that is freely transferable is more desirable and to that extent more valuable than one that is not. In that sense the witnesses for the United States did consider the restrictions on assignment as one element affecting value (R. 1102, 1173). However, in determining how much appellants' interest could be sold for, they both assumed a sale (R. 1095, 1200). That is to say, they determined how much a willing buyer would pay to secure, and how much a willing seller would accept to give up, an interest of restricted alienability such as appellants had. That is precisely the usual and proper measure of compensation; appellants' attempt to read into it an inconsistent and confiscatory theory of compensation is not justified by the record.

It is thus clear that appellants' attack upon the instruction to the jury and upon the method of valuation adopted by the trial court is unwarranted in view of the record. Moreover, we submit that the alternative method of valuation suggested for the first time in appellants' brief here is unsound. The suggestion is (Br. 40-48) that the proper procedure at the trial would have been to award the value of the undivided fee as of the date of taking appellants' interest, and then to apportion the award between appellants and Defense Plant Corporation, giving to Defense Plant Corporation the amount of its option price and to appellants the

remainder of the award (Br. 47). Appellants are of course correct in stating that the proper procedure is to value condemned property as a whole and then to apportion that award among the condemnees in proportion to their interests in the property. However, in arguing that this rule requires unit valuation of their interest and that of Defense Plant Corporation in the present case, they overlook the fact that the interest of Defense Plant Corporation was not included in the condemnation but was expressly excepted therefrom (R. 254). No procedural rule could justify, much less require, a court in condemnation to determine and distribute compensation for property outside the scope of the taking. The evaluation of a leasehold apart from the fee is no "insuperable task" as appellants suggest (Br. 43), but has on the contrary been successfully accomplished in some hundreds of cases in which the United States has condemned leasehold interests. See e. g., *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945).

There is no merit in appellants' contention that their compensation should be measured solely by the supposed excess of the value of the property over the option price. Cf. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123-124 (1924). Their own witnesses testified that that was but one element to consider in fixing market value (R. 817, 833, 870, 919, 922). Market value is ordinarily the proper measure of compensation for property taken in eminent domain. *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Miller*, 317 U. S. 369 (1943).[8] There is nothing in the circumstance that appellants' lease could not be assigned without the consent of the lessor that requires the adoption of any different measure. Just as the determination of market value assumes a willing buyer

[8] This does not mean, as appellants seem to assume (Br. 29-31), that market value is the standard for determining compensation only when there is an established market price for the property taken. As the Supreme Court pointed out in *Olson* v. *United States*, 292 U. S. 246, 257 (1934,) when property (in that case, flowage easements) is not currently bought and sold, the market value must be estimated, but the measure of compensation is that estimated market value. Cf. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123-124 (1924).

and a willing seller, so it would in this case assume an acquiescent lessor. That was in effect done by all the witnesses both of appellants and of the United States, whose testimony was based on an assumption, for the purpose of fixing market value, that appellants' interest in the property could be sold (R. 774, 816, 836, 869-870, 907, 1095, 1200). Market value was in fact the principal measure of compensation advanced by appellants and to which their evidence was directed (R. 748, 750-751, 801-802, 830-831, 869, 880-881); it is not now open to them to assert that a different measure should have been used. However, it may be observed that the measure they now suggest, the supposed excess of the option price over the value of the property (Br. 44), was considered by all of the valuation witnesses both for appellants (R. 747, 817, 833, 870, 919) and for the United States, the Government's evidence being that the option price greatly exceeded the value of the property (R. 1111-1113, 1202).

III.

The Trial Court Did Not Err in Allowing the United States to Impeach Appellants' Evidence by Showing an Admission Contained in Their Offer of Compromise.

For the purpose of showing the value of the consideration given by them, appellants introduced testimony by Mr. Tavares that a fair fee for appellants' supervisory services in constructing the shipyard would have been 10 per cent of the actual construction costs, because "That is a minimum fee that a contractor is entitled to when he builds anything for a guaranteed cost" (R. 741). On cross-examination the United States introduced, as an admission going to impeach that testimony (R. 788), a letter from Concrete Ship Constructors offering to compromise their claim for this taking and containing the unqualified statement that a minimum construction fee was three per cent, amounting in this case to $80,000 (R. 769-771). Appellants objected to that evidence on the ground that it was part of an unaccepted offer of compromise (R. 769). They now assign its admission as error (Br. 48-51).

Appellants are of course correct in their statement that an offer to compromise, as such, is not admissible in evi-

dence.[9] However, it is equally well settled that if a clear admission of a distinct fact is made in such an offer, that may be received in evidence as an admission against the party making it, despite the fact that it is contained in an offer of compromise. *Montana Tonopah Mining Co.* v. *Dunlap,* 196 Fed. 612, 617 (C. C. A. 9, 1912); *Cooper* v. *Brown,* 126 F. 2d 874, 878 (C. C. A. 3, 1942). That rule is in fact stated in the District Court of Appeal's opinion in *Citti* v. *Bava,* 254 Pac. 299 (1927),[10] quoted by appellants (Br. 51). The letter here complained of contained a distinct admission, made by way of explanation and not at all as a part of the offer, that a minimum fee would have been three per cent of construction costs (R. 770-771). The letter was offered solely for the purpose of showing that admission (R. 788). Its admissibility for that purpose, to impeach Mr. Tavares' testimony that a minimum fee would have been 10 per cent, cannot be doubted.

IV.

There Was No Prejudicial Error in the Government's Argument to the Jury.

In his argument to the jury, counsel for the United States made some references to appellants' past profits from operation of the property condemned (R. 1255, 1267, 1268, 1275, 1277), and appellants now contend that those references require reversal of the judgment (Br. 52-55).

In the trial court, appellants did not move for mistrial, object to the statements by government counsel, or even request an admonition to the jury. A party "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and

[9] It may be noted, however, that their reliance on California Code of Civil Procedure, sec. 997, to support that position is not justified. The letter here involved was not an offer to submit to judgment, which is all that is dealt with in that section. See Appellants' Brief, p. 50.

[10] That opinion was superseded by the decision of the California Supreme Court, 204 Cal. 136, 266 Pac. 954 (1928), which does not discuss the question of admissions of fact contained in offers of compromise.

prejudicial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S 150, 239 (1940). The present case is not such as to justify departure from the general rule.

As appears from the record references given, the statements quoted by appellants in their brief (pp. 52-53) occurred at rather widely separated points in the Government's argument. Taken thus from their several contexts and set out together, they do appear to advance the contention that appellants should receive nothing in the present condemnation because they had already profited largely from their dealings with the United States relating to this property. However, when the argument is read as a whole, it appears that the several statements were made as valid parts of legitimate arguments, addressed to the issues as developed in appellants' own theories and evidence. Thus, the reference (R. 1267) to appellants' admission in their letter of November 24, 1944 (R. 770-771), that a minimum fee for their services would have been $80,000, was a perfectly justified commentary on their contention that their compensation should be measured by the value of those services (R. 698-699) for which their evidence was that a minimum fee would have been more than three times that amount (R. 741). So also the reference to appellants' use of the facilities for private repairs (R. 1268-1269) was made not as a moral rebuke but as a step in developing the proposition that the principal use to be expected for the yard in the future was for private work which was not rent-free as work for the United States was (R. 1268-1272).

Appellants contend that the statement that they made profits is without support in the record (Br. 53). This overlooks the testimony of their own witness, Mr. Anewalt, that their profits had amounted to $1,000,000 a year (R. 851). Appellants contend that reference to their profits was irrelevant and prejudicial (Br. 53-54). Its relevancy to the issues is shown by the fact that Mr. Anewalt gave it as justification for his valuation of the lease (R. 851).

V.

The Trial Court Did Not Err in Failing to Instruct the Jury As to the Legal Effect of Appellants' Lease Agreement.

Appellants contend that the trial court erred in permitting testimony to be submitted to the jury as to the legal effect of appellants' lease agreement, rather than instructing the jury thereon (Br. 55-61). There are several answers to that contention.

Appellants were the first to introduce testimony as to the legal effect of their lease (R. 749, 798-801, 832-835, 870, 884-889). Having themselves put the subject before the jury, they cannot now be heard to object that the jury was allowed to consider it. Also, appellants made no request for an instruction on the subject. In the absence of a request, failure to give an instruction cannot be attacked on appeal. *Puget Sound Power & L. Co.* v. *Public Utility Dist. No. 1,* 123 F. 2d 286, 291 (C. C. A. 9, 1941). Even under the liberal California statute, it is only the refusal, and not the mere failure, to give an instruction that is deemed excepted to. California Code of Civil Procedure, sec. 647.

The testimony was in every instance given by the witnesses for the purpose of showing the assumptions on which their valuations were based (R. 749, 797-801, 831-835, 869-870, 881-889, 1096-1104, 1168-1171). Obviously that information was necessary to enable the jury to weigh the opinions of the witnesses.[11] The agreement itself was put in evidence by consent (R. 696-697) and the jury could compare its terms with the construction put on it by the various witnesses or appellants could develop its meaning in their argument to the jury, or request the court to instruct the jury with regard thereto.

Finally, it may be suggested that the true legal construction of appellants' lease was not in issue in the case. The issue was the market value of their rights under it, which would depend on how that lease appealed to prospective

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[11] Among other things, appellants challenge the correctness of a statement by the Government's witness Shattuck that the provision for use of the yard free of rent applied only to use for government work (Br. 55-56). The fact is, however, that appellants conceded at the trial that that was true (R. 724) and the testimony of their witnesses was to the same effect (R. 749, 793, 824, 851).

buyers, rather than on how it should be construed by a court (cf. R. 1142, 1160, 1200). In that aspect, testimony by real estate appraisers was more appropriate than an instruction from the court would have been. Be that as it may, appellants are precluded here by their failure to raise the point at the trial.

VI.

The Verdict and Judgment Are Supported by Substantial Evidence.

Appellants contend that the award of nothing for their interest must be reversed as unsupported by evidence (Br. 61-63). Two witnesses for the United States testified that appellants' interest had no value (R. 1116, 1175); but appellants would disregard that testimony because they believe that it was based on erroneous premises (Br. 61). That amounts to no more than an attempt to have this Court reweigh the evidence. The opinions of the Government's witnesses were in evidence; the grounds on which they were based were fully brought out by direct and cross-examination (R. 1096-1117, 1125-1160, 1168-1175, 1178-1206) and appellants made no motion to strike their testimony. The jury was entitled to consider the testimony and to give it such weight as it appeared to deserve. Both witnesses considered the relationship between the option price and the value of the property, which appellants now urge should be the sole measure of their compensation (Br. 44), and both concluded that the value of the property was substantially below the option price (R. 1112-1113, 1202). Under appellants' own view that alone fully justified the opinion that their interest was worthless. In addition, the witnesses considered the value of the lease contract, including the right of free use for government work, and concluded that the uncertainties to which it was subject and doubt as to future need for such facilities would make it unattractive to purchasers (R. 1113-1117, 1132, 1151-1153, 1160, 1174, 1199-1200). Certainly those are valid grounds for the opinions of qualified experts; it cannot be said that the jury erred as a matter of law in giving credence to them.

VII.

The Verdict and Judgment Are Not Contrary to Law.

Appellants argue that the verdict and judgment awarding them nothing, are contrary to law (Br. 64-65). The court instructed the jury to give appellants only a nominal award if they could have sold their rights only for a nominal sum (R. 1293), and to award them nothing if they could not have sold their rights at all (R. 1295-1296). As we have shown under Point II, *supra,* the latter instruction referred to an inability to sell due to lack of attraction for buyers. By awarding appellants nothing under the above instructions, the jury expressed its belief that no buyer would have paid even a nominal sum to acquire such rights as appellants had. Appellants contend that this violates the Fifth Amendment, which they construe as guaranteeing them some award in any case. It is true that nominal compensation is commonly given when valueless properties are condemned; but the constitutional requirement of "just compensation" is one of substance rather than form, and an award of nothing for a valueless property is quite as just as an award of one dollar. "Nothing was recoverable as just compensation, because nothing of value was taken from the company; * * *." *Marion & c Ry.* v. *United States,* 270 U. S. 280, 282 (1926). Certainly it does not appear how the error, if it were such, in failing to award a nominal sum could be prejudicial.

VIII.

The Trial Court Erred in Ordering the Judgment Modified to Exclude Appellants' Purchase Option.

Appellants filed their notice of appeal on August 26, 1947 (R. 367). Thereafter, on November 18, 1947, they filed their notice of motion to correct and modify the judgment (R. 381-382). On December 2, 1947, the Court entered its order thereon, directing that the judgment be modified to omit appellants' purchase option from the description of their rights condemned and compensated for in this proceeding (R. 389, 1418-1448, 1459). The United States appeals from that order (R. 1460-1461).

When the proposed judgment was presented to the court, the court asked whether appellants had any objections to

its form, to which their counsel replied that their only objections were the same as were set forth in their motion for new trial (R. 1334). One of the objections made with that motion was that the court had improperly instructed the jury as to the measure of compensation for the option (R. 332-342). Thus it was clearly brought to the court's attention that appellants, like the United States, considered that the issue of compensation for the option had been tried, and that it was likewise included in the judgment. Appellants' subsequent motion to modify the judgment on the ground that the option had not been included in the issues tried was thus diametrically opposed to the position taken by them when the judgment was entered.

The court's order modifying the judgment was made on the ground that the word "option" had been included in the judgment by inadvertence (R. 1437), and that by striking that word from the judgment the judgment would be made to conform to what the court had expressed its intention to be throughout the proceedings (R. 1439). As has been shown under Point I, *supra,* the court had, on the contrary, ruled at pre-trial and consistently taken the view thereafter that the option was included in the taking and was compensable in this proceeding. On that ground it had overruled the Government's objection to appellants' evidence as to the value of the option (R. 745-747, 781, 802, 830-831, 869, 881). On that premise it had twice instructed the jury that in fixing appellants' award, if any, "you are also instructed to take into consideration the option rights" (R. 1294, 1302), and that in valuing appellants' interest, which arose out of a "lease coupled with an option," "You will consider the entire instrument, not just parts of it" (R. 1295, 1303). The court plainly erred in ruling that the issue of compensation for the option was not tried and submitted to the jury.

In ordering the judgment modified to exclude the option, the court was not making it conform to the issues as tried, as it purported to be doing. It was, on the contrary, creating a disparity between the issues tried and the judgment. The change was erroneous on the record and, being more than a mere clerical correction, was beyond the jurisdiction of the court to make after an appeal had been taken.

Bankers Indemnity Ins. Co. v. *Pinkerton,* 89 F. 2d 194, 199-200 (C. C. A. 9, 1937), certiorari denied 302 U. S. 704. Such an order is final and appealable. *Massachusetts Fire & Marine Ins. Co.* v. *Schmick,* 58 F. 2d 130 (C. C. A. 8, 1932).

CONCLUSION.

For the foregoing reasons, the order of December 2, 1947, modifying the judgment, should be reversed and the judgment as entered June 6, 1947, should be affirmed.

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